No. 89-1058

In The

Supreme Court of the United States

October Term, 1989

VAL J. PORTER,

Petitioner,

v.

CITY OF ATLANTA,

Respondent.

A-TOW, INC.,

Petitioner,

v.

CITY OF ATLANTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether a city ordinance which requires wrecker services to accept checks and credit cards, in lieu of cash, for the payment of any and all fees and costs resulting from the towing and storage of an impounded vehicle violates article I, section 8 of the United States Constitution which gives Congress the exclusive power to establish and regulate currency, and article I, section 10 of the Constitution which prohibits states from making anything but gold and silver coin legal tender?

2. Whether a city ordinance which requires wrecker services to post a sign stating the towing fee and storage rate charged, and which regulates the location, size and color of such sign, is on its face an unwarranted restriction of commercial speech in violation of the first amendment?

3. Whether a city ordinance which requires wrecker services to post a sign stating the towing fee and storage rate charged, and which regulates the location, size and color of such sign, is an invalid restriction of commercial speech as applied to a wrecker service where there was no showing that such wrecker service's sign was misleading and where the city asserted no substantial interest promoted by the ordinance?

4. Whether a state court, in passing upon the validity of a city ordinance regulating commercial speech, may ignore standards adopted by this Court for determining the validity of such a law under the first amendment?

LIST OF PARTIES AND RULE 28.1 LIST

The caption of the case contains the names of all parties.

There are no parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates of the Petitioners.

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CITY OF ATLANTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The petitioners, VAL J. PORTER and A-TOW, INC., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia, entered in the above-entitled proceeding on October 13, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia is unreported and may be found as *Val J. Porter v. City of Atlanta*, No. S89A0015 and *A-Tow, Inc. v. City of Atlanta*, No. A89A0121, slip op. (Ga. Filed 10/13/89), and is reprinted in the appendix hereto, p. A-1, *infra*.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on October 13, 1989, affirming Petitioner A-Tow's convictions dated May 12, 1989, and Petitioner Porter's conviction dated April 4, 1989. The supreme court denied timely petitions for rehearing on November 8, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Atlanta, Ga. City Code §§ 14-9012(c) & (g).

> (c) There shall be posted at the entrance to the impound lot nearest the impound lot office, a sign, the minimum size of which shall be 24 inches by 24 inches, painted white with red lettering, stating the towing charge, the storage rate per day and any additional information pertinent to the impoundment of vehicles.
>
> (g) It shall be unlawful for any wrecker services, to operate within the City of Atlanta without employing the services of both a check approval agency and a credit card service; and it shall be unlawful to refuse to accept, in lieu of

cash, any check which can be insured by the check approval agency or any major credit card, for the payment of any and all fees and costs resulting from the towing and storage of an impounded vehicle. For purposes of this section, "major credit card" shall mean a Visa, Mastercard, or American Express card.

31 U.S.C.A. § 5103 (West 1983 & Supp. 1989).

Legal tender

United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues. Foreign gold or silver coins are not legal tender for debts.

U.S. Const. art. I, § 8, cl. 2 & 5

The Congress shall have Power . . . To borrow Money on the credit of the United States . . . To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures . . .

U.S. Const. art. I, § 10

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

peaceably to assemble, and petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Petitioner A-Tow, Inc. is a Georgia corporation engaged in the wrecker service business in and around the City of Atlanta, Georgia. Petitioner Val J. Porter is the sole shareholder and president of A-Tow and has been in the towing business for over twenty-five years.

Respondent is the City of Atlanta. It regulates vehicle towing and the operation of tow trucks or wreckers within its territorial limits. The City has over the years enacted a number of ordinances aimed at circumscribing the practices of wrecker service operators.

On May 12, 1989, A-Tow was convicted in the Municipal Court of Atlanta, Georgia, of violating two such city ordinances. One conviction involved a violation of city ordinance section 14-9012(g) which requires a wrecker service to accept checks or major credit cards, in lieu of cash, as payment for any and all fees and costs resulting from the towing and storage of an impounded vehicle. A-Tow had refused to accept a personal check drawn on an out-of-state bank and was fined $500 and sentenced to 30 days in jail.

The second conviction involved a violation of city ordinance section 14-9012(c) which regulates the location, size, content and color of signs wrecker services must post. Evidence introduced during the trial showed that A-Tow maintains a sign that complies with the ordinance in all respects except location. A-Tow's sign is posted in

plain view on the building housing its impound lot office; approximately four feet from the prescribed location. There was no evidence that A-Tow's sign is in any way misleading. A-Tow was fined $500 and sentenced to 20 days in jail for violating the ordinance.

On April 4, 1989, Porter was convicted in the Municipal Court of Atlanta, Georgia, on two counts of violating city ordinance section 14-9012(g) for refusing to accept personal checks, in lieu of cash, as payment for towing services rendered. Porter was fined $500 on each count and sentenced to 30 days in jail on one count and 60 days in jail on the second.

During its trial, A-Tow challenged the constitutionality of both ordinances in its Motion to Dismiss. A-Tow argued that section 14-9012(g) is an attempt by the City to make checks and credit cards legal tender for the payment of debts in violation of article I, sections 8 and 10 of the United States Constitution. A-Tow argued that section 14-9012(c) is an unwarranted regulation of commercial speech in violation of the first amendment of the Constitution since it neither implements a substantial government interest nor directly advances that interest, and because it reaches farther than is necessary to accomplish any lawful objective.

The City maintained that it enacted sections 14-9012(g) and 14-9012(c) in an attempt to curtail some of the abuses that were running rampant in the wrecker industry operating within the city. The City made no effort to further articulate its reasons for adopting either ordinance. The City argued that section 14-9012(g) did not make checks and credit cards legal tender for the

payment of debts owed wrecker services because such debts are discharged when payment is later received in lawful money from a third party. The City argued that section 14-9012(c) did not violate the first amendment because the ordinance invites full public disclosure of prices charged by wrecker services and thus requires rather than restricts speech.

The trial court denied A-Tow's Motion to Dismiss without opinion. Thereafter, A-Tow and Porter appealed their convictions to the Supreme Court of Georgia and again challenged the constitutionality of both ordinances on the same grounds as raised in A-Tow's Motion to Dismiss. The supreme court affirmed A-Tow's and Porter's convictions under the check ordinance, adopting the City's reasoning that payment by check or credit card is the equivalent of payment in legal tender. The supreme court also affirmed A-Tow's conviction under the sign ordinance finding that the ordinance was a reasonable exercise of the City's police power. The court upheld the ordinance despite the City's failure to assert a substantial interest to be served by the ordinance. The supreme court's opinion is reprinted in the appendix hereto, at p. A-1, *infra*.

REASONS FOR GRANTING THE WRIT

Introduction

The City of Atlanta has adopted an ordinance making it a criminal offense for a wrecker service to refuse to accept checks and credit cards, in lieu of cash, for payment of fees and costs resulting from towing and storage.

The City has in effect made checks and credit cards legal tender for these debts in violation of article I, sections 8 and 10 of the United States Constitution. In exercising a power forbidden it by the Constitution, the City has enacted an ordinance with potentially disastrous economic consequences. The Supreme Court of Georgia upheld the City's power to enact such an ordinance and to enforce it through criminal sanctions. The court's decision is an extremely dangerous precedent in that it serves notice to other cities and governmental bodies that they are free to act in a fashion similar to Atlanta.

The City of Atlanta has also adopted an ordinance which requires wrecker services to post signs and which regulates the size, location, color and content of such signs. The ordinance is an attempt by the City to regulate commercial speech. The Georgia Supreme Court found the ordinance to be a reasonable exercise of the City's police powers without carefully weighing the City's regulatory interests against the right of wrecker services to free expression. The court upheld the ordinance despite the City's failure to meet its burden of asserting a substantial interest advanced by the ordinance. The court's opinion is erroneous to the extent it found the ordinance to be a reasonable exercise of the City's police power. The court's opinion is in direct conflict with decisions of this Court to the extent it ignored standards adopted by this Court for determining the validity of a law regulating commercial speech under the first amendment.

DISCUSSION OF QUESTIONS

I. The Georgia Supreme Court Decision Upholding The Constitutionality Of A City Of Atlanta Ordinance Requiring Wrecker Services To Accept Checks Or Credit Cards, In Lieu Of Cash, For Payment Of Debts Is An Erroneous And Dangerous Precedent with Far Reaching And Potentially Disastrous Economic Consequences.

A. The City Of Atlanta Ordinance Violates Article I, Sections 8 And 10 Of The United States Constitution.

The Constitution of the United States specifically provides that Congress shall have the power to borrow money on the credit of the United States, and to coin money and regulate its value. *See* U.S. Const. art. I, § 8, cl. 2 & 5. In *The Legal Tender Cases*, 110 U.S. 421, 428 (1884) this Court held that:

> Under these two powers, taken together, congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes as regards the national government or private individuals.

Thus, this Court layed to rest any doubt that Congress has the power to determine what is legal tender for the payment of public and private debts.

It is also well established that this power is one held exclusively by the United States government and that the states are prohibited from declaring what shall pass for money. Article I, § 10 of the United States Constitution provides in pertinent part that "[n]o state shall . . . coin money . . . emit bills of credit . . . [or] make any thing but gold and silver coin a tender in payment of debts. . . . " In

Norman v. Baltimore & O.R., Co., 294 U.S. 240, 303 (1935) this Court stated that:

> The Constitution "was designed to provide the same currency, having a uniform legal value in all the States." It was for that reason that the power to regulate the value of money was conferred upon the federal government, while the same power, as well as the power to emit bills of credit, was withdrawn from the states. The states cannot declare what shall be money, or regulate its value.

Pursuant to its power to regulate currency, Congress has enacted a comprehensive body of statutes dealing with coins, currency and legal tender. *See* U.S.C. §§ 5101 et seq. Congress has determined that United States coins and currency, including Federal reserve notes, shall be legal tender. 31 U.S.C.A. § 5103 (West 1983 & Supp. 1989). Congress has, in effect, declared that checks and credit cards are not legal tender by failing to denominate them as such in its statutory scheme.

The City of Atlanta has taken it upon itself to declare that checks and credit cards shall be legal tender in payment of obligations owed to wrecker services. In its decision upholding the ordinance, the Supreme Court of Georgia reasoned that the ordinance did not require wrecker services to accept something other than legal tender to discharge a debt because the debt is discharged in legal tender when payment is later received through a third party. The court's reasoning does not, however, comport with financial reality or with the law.

Although checks and credit cards are used to satisfy obligations with increasing frequency in this country, they have never been considered a substitute for cash. *See*

Fry, *Cash Only – No Checks Accepted: A Reply*, 90 Com. L.J. 175 (1985). There are obvious and important differences between cash and other forms of payment. Perhaps, most importantly, is the fact that cash is a fungible and may be used to pay any obligation. Checks and credit cards are not a fungible and creditors have no obligation to accept them. For example, U.C.C. § 2-511(2) (1978 & Supp. 1989) permits a creditor to reject payment by check and to demand payment in legal tender. *See also Brock v. Baker*, 128 Ga. App. 397, 398 (1973) (strictly speaking, a check is not legal tender and a creditor may demand payment in coin).

Another major distinction between cash and other forms of payment is that when cash is tendered the obligation is immediately satisfied. The delivery of a check to a creditor merely suspends the obligation. U.C.C. § 3-802(1)(b) (1978 & Supp. 1989). The obligation is not satisfied until the check is honored. If the check is dishonored, the creditor may never receive satisfaction for the obligation. Thus, it is simply a fallacy to equate payment of an obligation by check or credit card with payment in legal tender as the Georgia court has done.

The Georgia court also ignored federal case authority dealing specifically with this issue. In *Capital Grain & Feed Co. v. Federal Reserve Bank of Atlanta*, 3 F.2d 614 (N.D. Ga.), *appeal dismissed*, 269 U.S. 589 (1925), the district court examined an Alabama statute which provided that when a check was presented or forwarded to a payee bank for payment through another bank or agency, the payee bank could at its option make payment in cash or by its own check.

The court invalidated the statute finding it to be "a plain effort to make a debt by general deposit dischargeable by something else than gold or silver coin or other medium fixed by constitutional federal authority." *Id.* at 616. The court found the statute fatally defective because it deprived depositors of the right to collect their debts in money. *Id. Cf. Farmers' and Merchants' Bank v. Federal Reserve Bank of Richmond*, 262 U.S. 649, 659 (1923) (North Carolina statute giving bank right to pay its check by another check, except where depositor specified it should be paid in money, held good since it did not deprive depositor of right to collect in money).

B. The City Of Atlanta Ordinance And The Decision Upholding It Have Potentially Disastrous Economic Consequences.

A uniform monetary system is an essential requisite of commerce. The drafters of the Constitution understood this and acted to ensure that states could not impair this country's economy as they had so disastrously done during the revolutionary period by issuing paper money. D. Watson, The Constitution of the United States 765 (1910). In The Federalist, James Madison described the evil wrought by the practices of states during that period.

> The loss which America has sustained since the peace, from the pestilent effects of paper money on the necessary confidence in the public councils; on the industry and morals of the people, and on the character of republican government, constitutes an enormous debt against the States, chargeable with this unadvised measure, which must long remain unsatisfied; or rather an accumulation of guilt, which can be expiated no

> otherwise than by a voluntary sacrifice on the altar of justice, of the power which has been the instrument of it. In addition to these persuasive considerations, it may be observed, that the same reasons which show the necessity of denying to the States the power of regulating coin, prove with equal force, that they ought not to be at liberty to substitute a paper medium in the place of coin. Had every State a right to regulate the value of its coin, there might be as many different currencies as States; and thus the intercourse among them would be impeded; retrospective alterations in its value might be made, and thus citizens of other States be injured; and animosities be kindled among the States themselves.

The Federalist No. 44, at 300-01 (J. Madison)(J. Cooke ed. 1961).

The City of Atlanta's ordinance gives rise to evils similar to those described by Madison. It substitutes checks and credit cards for cash in transactions between wrecker services and their customers. It deprives wrecker service operators of the right to collect their debts in money and mandates that they accept a medium of payment which they cannot use to satisfy their own obligations. It creates uncertainty and erodes confidence in the wrecker business as there is a real possibility that wrecker service operators will never actually receive money for debts owed them, and that some may fail financially as a result.

The decision upholding the ordinance is a dangerous precedent because it sanctions the authority of every city or other governmental body to enact laws substituting an obligation payable by a third party for cash as a medium

of payment. This country's economy could not long survive if every city, county and state took it upon itself to declare what shall be received in payment of debts. The Georgia court's decision therefore merits review by this Court.

II. The Georgia Supreme Court Decision Upholding The Constitutionality Of A City Of Atlanta Ordinance Regulating The Location, Size, Color And Content Of Signs Wrecker Services Must Post Is Erroneous And In Conflict With The Decisions Of This Court.

A. The City Of Atlanta Ordinance Is An Unwarranted Regulation Of Commercial Speech In Violation Of The First Amendment As Applied To The States Through The Fourteenth Amendment.

The City's sign ordinance regulates commercial speech, that is, it regulates expressions related to the economic interests of wrecker services and their customers. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980). While the Constitution affords less protection to commercial speech than other forms of constitutionally guaranteed expressions, states do not have complete power to suppress or regulate such expression. *Id.* at 563-64. The degree of protection afforded particular commercial expression depends upon the nature of the expression and the governmental interests served by its regulation. *Id.* at 564. This Court has adopted the following four-part test for determining the validity of government regulations affecting commercial speech.

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Id. at 567; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508 (1981).

There is no evidence or suggestion that the commercial speech at issue here involves unlawful activity or is in any way misleading. Towing is a lawful business in Georgia and there is nothing inherently misleading about A-Tow's sign which is readily observable and which contains factual statements describing fees charged for towing and storage. Since the communication at issue here is neither misleading nor related to an unlawful activity, it falls within that area of speech protected by the first amendment. It is, therefore, the City's burden to not only assert a substantial interest to be served by the ordinance, but to demonstrate that the ordinance directly advances that interest and that it reaches no further than necessary. *Central Hudson Gas*, 447 U.S. at 565.

The City made faint effort to meet its burden. It denied that its ordinance unconstitutionally infringed on commercial speech because the ordinance requires rather than restricts disclosure. The City apparently believes that requiring speech is less onerous than restricting it and, therefore, its burden under the first amendment is correspondingly diminished. In *Pacific Gas & Elec. Co. v. Public Utilities Com'n of California*, 475 U.S. 1, 11, *reh'g denied*, 475 U.S. 1133 (1986). This Court reaffirmed the

principle that the first amendment's prohibitions against improper restraints of voluntary expression apply with equal vigor to regulations improperly requiring speech. Thus, whether the ordinance restricts or requires speech, the City must assert a substantial interest to be served by it.

The only justification the City advanced for this ordinance was that it was enacted to protect citizens from the abusive practices of wrecker services. The City made no effort to further articulate what substantial interest the ordinance was intended to advance. Since A-Tow's sign was not shown to be misleading and since the City asserted no substantial interest promoted by the restrictions, the ordinance is invalid as applied. *In re R.M.J.*, 455 U.S. 191, 205-06 (1982).

The ordinance is also facially invalid as there can be no interest asserted by the city substantial enough to justify an ordinance which requires a business to post a sign and then dictates to that business the size, location, content and color of that sign. In *Metromedia*, this Court found the twin goals of traffic safety and the appearance of the city substantial enough interests to justify a San Diego ordinance imposing significant restrictions on the erection of outdoor advertising displays. 453 U.S. at 508-09. Certainly, public safety and aesthetics are not at issue here. Requiring signs to be white with red letters does nothing to promote public safety and it can hardly be argued that such requirements do anything to improve the appearance of the City of Atlanta.

The City may have an interest in promoting the public disclosure of prices, but such an interest hardly justifies an ordinance which requires a business to give notice of its prices while strictly specifying, even as to color, the manner in which such notice must be given. Moreover, the requirements imposed by the ordinance are not a direct nor narrowly tailored means of furthering that interest.

For example, the ordinance requires signs to be posted at the entrance to the impound lot nearest the impound lot office. Logically, individuals looking to recover their impounded vehicles would head first to the impound lot office. Any sign describing towing and storage fees would be more effective if posted there, rather than somewhere else. Thus, the ordinance does not directly advance the purpose of public disclosure of prices. Such a purpose is in fact defeated if the impound lot gate is located any significant distance from the impound lot office in an area where the public is not likely to venture.

B. The Georgia Supreme Court Opinion Conflicts With Decisions Of This Court To The Extent It Ignored Standards Adopted By This Court For Determining The Validity Of A Law Regulating Commercial Speech.

In affirming A-Tow's conviction, the Georgia court determined that the City's ordinance was a reasonable exercise of its police powers. The court failed to analyze the ordinance under the rubric adopted by this Court in *Central Hudson Gas & Elec. Corp. v. Public Ser. Com'n of N.Y.*, 447 U.S. 557 (1980). The court upheld the ordinance

despite the City's total failure to meet its burden of asserting a substantial interest served by the ordinance. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), this Court stated that:

> [A] court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.

The Georgia court failed in its task here and, by ignoring standards adopted by this Court, placed itself in conflict with the decisions of this Court.

CONCLUSION

For these reasons, VAL J. PORTER and A-TOW, INC. respectfully request that the Supreme Court accept certiorari in this case.

Respectfully submitted,

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December 28, 1989

APPENDIX

In the Supreme Court of Georgia

Decided: Oct. 13, 1989

S89A0015. VAL J. PORTER V. CITY OF ATLANTA.
S89A0121. A-TOW, INC. V. CITY OF ATLANTA.
CLARKE, Presiding Justice.

Appellant A-Tow, Inc. is a wrecker service owned and operated by appellant Val J. Porter. A-Tow and Porter were convicted of violating an Atlanta City ordinance by failing to accept checks. A-Tow was also convicted under another city ordinance for failing to post the required signs around the business. They appeal their convictions and challenge the constitutionality of the ordinances. We affirm the convictions.

1. Determining the validity of a city ordinance is generally a two step process. First, the court must determine whether the local government possessed the power to enact the ordinance. *Allison v. Medlock*, 224 Ga. 37 (159 SE2d 384) (1967). If the power exists, the court must then determine whether the exercise of power is clearly reasonable. *Medlock v. Allison*, 224 Ga. 648 (164 SE2d 112) (1968).

Municipal corporations are creations of the state and possess only those powers that have been expressly or impliedly granted to them. *City of Macon v. Walker*, 204 Ga. 810 (51 SE2d 633) (1949); *Pierce v. Powell*, 188 Ga. 481, (4 SE2d 192) (1939). The source of their power is the delegation of power from the state, manifested in the constitution, state laws, and the municipal charter. Allocations of power from the state to local governments

are strictly construed. *Id.; see also* P. Sentell, Jr., Discretion in Local Government, 8 Ga. L. Rev. 614, 617 (1974).[1]

Appellants contend that the city lacks the power to regulate a business. While it is true that the regulation of private enterprise is one of the most significant and potentially objectionable powers a municipality may exercise, it has long been recognized that delegation of that authority from the state does not violate any constitutional principle. *See, generally,* P. Sentell, The Power to Prohibit, 9 Ga. L. Rev. 115 (1974). "The right of the legislature to regulate trade, and to authorize municipal corporations so to do within their respective limits, has been recognized by this court from the time of its organization." *Badkins v. Robinson,* 53 Ga. 613 (1875). Local ordinances regulating everything from selling fresh meat to operating pin-ball machines have been upheld. *See, Id;* and *Wallace v. City of Cartersville,* 203 Ga. 63, 45 SE2d 63, *cert. denied* 333 U.S. 843 (92 LEd 1126, 68 SC 661) (1947). Nevertheless, the topic remains hotly controversial in the law of local government and has failed to yield dependable legal constants. This is so, not because of uncertainty about the source of power to regulate, but because of inconsistencies in how the reasonableness of a regulation is determined. (See discussion below.) The general authority to license and regulate "privileges, occupations, trades and professions," found in the city charter at Appendix I, section (2), in conjunction with the specific

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[1] Even when power is specifically delegated, local governments may not enact any ordinance is [sic] that is preempted by or conflicts with state legislation or is inconsistent with the constitution. O.C.G.A. § 36-35-6. These issues are not raised here.

authority to regulate those businesses operating in the city which "may be dangerous to persons or property," Appendix I, section (18), and to "regulate and license vehicles operated for hire . . . and parking," Appendix I, section (37), is sufficient to support the exercise of authority to regulate towing or wrecker services.[2]

Once a source of authority for regulation is identified, the next issue for resolution is whether the specific exercise of power is clearly reasonable. P. Sentell, Discretion in Local Government, 8 Ga. L. Rev. 614, 619. Under our system, the power to regulate exists not as an arm of privilege for the governors but as an armor of protection for the governed. Its purpose is to allow the governing authorities to shield the public from the excesses of private persons or groups in their exercise of private activities. In carrying out this function of government, the law requires careful attention to the activity made subject to the power to regulate. The greater the potential for abuse or danger to the public inherent in an activity, the greater the right to exercise control and, conversely, the more benign the private activity, the narrower the government power to control it. This must be so because although private interest can pose a danger of abuse, excessive government control in the name of protectionism can pose an even greater danger.

All of this mandates that the courts must view the exercise of government authority to regulate private

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[2] Appellants do not argue and we do not reach the issue of whether newly amended O.C.G.A. § 44-1-13, which went into effect after the convictions at issue here, circumscribes or preempts the authority to regulate towing and storage firms.

enterprise carefully. Such regulations are not presumptively reasonable, but must be demonstrably reasonable after the affected interests are balanced. We must weigh the protective value the regulation affords to the public against the oppressiveness it imposes on the rights of individuals. For, after all, our system has always held individual rights at the pinnacle of its aim.

The ordinances at issue here regulate the operation of towing or wrecker services. Unlike run-of-the-mill business activities, the enterprise involved in this case holds the potential to infringe severely on the rights of the public. Because of a small debt, such as non-payment of a $2 parking fee, a land owner may call a towing service and have a vehicle removed from her property. The law then allows the towing service to do more than just tow the automobile away to its establishment. It allows the charge of an involuntary fee and, even more severely, it authorizes the summary impress of a lien in the amount of that fee so as to deprive the owner of her automobile when it is not or cannot be paid. O.C.G.A. § 44-1-13. The law gives the towing company a great advantage over the owner of the towed car, and creates a great potential for unfair business practices and abuse of the public.

The power of a municipal governing authority to regulate or limit legitimate business activities is not unfettered.[3] In fact, the law favors the free exercise of

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[3] See OCGA § 36-35-6(b). "(b) The power granted in subsections (a) and (b) of Code Section 36-35-3 shall not include the power to take any action affecting the private or civil law governing private or civil relationships, except as is incident to the exercise of an independent governmental power.

business activities and examines closely any governmental limitations upon it. The question here is whether the type of business activity in which Mr. Porter and A-Tow are engaged so severely invades the rights of members of the public so as to make government regulation more than merely desireable [sic] but, in fact, essential.

The business activity involved here goes beyond that of providing a service to property owners upon whose land cars are parked without permission. It reaches into an area generally reserved to governmental authorities because the ordinance allows the licensee to summarily deprive the automobile owner of the use of his property. When a governing authority grants such an oppressive right, it must reserve unto itself the power to limit the methods and extent of the exercise of that right. We therefore hold that the ordinances at issue here are clearly reasonable and valid.

2. Appellants next contend that the requirement that wrecker services accept checks and credit cards violates Article I, Section 8 of the U.S. Constitution because it attempts to legislate a change in legal tender. This contention is without merit. The regulation does not require appellees to accept something other than legal tender to discharge a debt. The debt is discharged when the appellants receive payment in legal tender through a third party institution.

3. Appellants argue that the ordinance section 14-9012(g) is void for vagueness because of the use of the

word "insured."[4] We do not agree. The test for whether a statute is void for vagueness and thus violative of due process is whether the statute forbids or requires an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application. *Gouge v. City of Snellville,* 249 Ga. 91 (287 SE2d 539) (1982). We hold that the word "insured" as used in the ordinance is not so vague as to implicate due process considerations. The word, reasonably construed, means that a check approval agency will indemnify the wrecker service if the drawer's bank account does not have sufficient funds to cover the amount stated at the time of presentment.

4. Appellants next assert that there was no evidence that a check was properly tendered. Indeed, no fully drafted check was entered into evidence at trial. However, the complaining witnesses all testified that they requested to pay by check but did not continue to draft the check when they were told unqualifiedly that it would be refused. Under Georgia law, formal tender is unnecessary where the person to whom the money is due indicates that tender would be refused. O.C.G.A. § 13-4-24; *Good v. Tri-Cep, Inc.,* 248 Ga. 684 (285 SE2d 527) (1982). Moreover, the ordinance does not require formal tender. We conclude that the ordinance was violated when appellants indicated that any check, if written, would be refused.

5. Appellants further assert that there was insufficient evidence that the required signs were not properly

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[4] The ordinance states, "it shall be unlawful [for a wrecker service] to refuse to accept, in lieu of cash, any check which can be insured by a check approval agency . . . "

posted. After reviewing the testimony presented at the trial, we conclude that there was sufficient evidence to support the conviction for failing to post the required signs. *Jackson v. Virginia*, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979).

6. Finally, Porter argues that the check cashing ordinance does not authorize a penalty to be imposed on the owner of a wrecker service. He contends that only the service itself may be punished. We disagree. The evidence presented at trial indicated that Porter, as the owner and operator of the corporation, has complete authority and responsibility for the actions and policies of the corporation. Porter himself testified that whenever anyone asks to pay by check, he handles the matter personally. Moreover, the transactions which gave rise to the charges against Porter were separate from those for which A-Tow was charged. Porter was present and in charge of the business during both transactions for which he was charged. In one of the instances Porter personally directed the service and personally refused to accept the check as required by the ordinance. Therefore, we conclude that he may be held criminally liable under the ordinance at issue here. *O'Brien v. Dekalb County*, 256 Ga. 757, 353 SE2d 31 (1987).

In conclusion, we find no infirmity in the ordinances or error in the trial proceedings. Therefore, the convictions are affirmed.

Judgments affirmed. All the Justices concur.

SUPREME COURT OF GEORGIA

ATLANTA NOVEMBER 08, 1989

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S89A0015

VAL J. PORTER V. CITY OF ATLANTA

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

SUPREME COURT OF GEORGIA

ATLANTA NOVEMBER 08, 1989

The Honorable. Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S89A0121

A-TOW, INC. V. CITY OF ATLANTA

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta
I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court
affixed the day and year last above written.
Joline B. Williams, Clerk.